I should be more ready to pay attention to suggestions that the plaintiff has not done his duty as Executor if the defendants had put forward allegations on oath against him, in which case they would have been liable to be subjected to cross-examination. As it is, the plaintiff had his account passed by this Court and was granted commission by this Court in 1930 and for the reasons stated above this would appear to be the proper Court for the taking of the account. Nor do I think the 2nd defendant will suffer any considerable hardship by this course. He is in this country now and if he and the 1st defendant really are anxious and willing to have the account taken, there need be no undue delay in the proceedings. It will not even be necessary, unless he so desires, for him to be here in person when the accounts are taken.

For all the above reasons I am of opinion that there should be no stay in these proceedings and accordingly I make an Order in terms of Prayer 1(a).

I think that as regards Prayer 1(b) and Prayer (2) this application should stand over until the accounts have been taken, except that I award solicitor and client costs of this Originating Summons up to date to plaintiff out of the Estate in any event.

Both parties to have liberty to apply.

Order accordingly.

JACOB v. PUBLIC PROSECUTOR

[A. Cr. J. (Callow J.) April 2, 1948]

[Seremban — Criminal Appeal No. 5 of 1948]

Penal Code s. 503 — Criminal Intimidation — Evidence of System — Witness called by Court after close of defence — Opportunity to be afforded to the defence to cross-examine and to call evidence in rebuttal — Evidence Enactment s. 15 — Criminal Procedure Code (Cap. 6), ss. 316(b) and 425.

This was an appeal against the conviction of the appellant for criminal intimidation. The two principal grounds of appeal were: (a) that the evidence of system was wrongly admitted in evidence; (b) that the defendant was not afforded an opportunity to rebut the evidence of the witness called by the Court, such witness having been called by the Court after the close of the case for the defence.

Held: (1) evidence of system should not be tendered before the testimony of the principal witness or at least his examination-in-chief has been heard as the nature of the defence will not then have become apparent by cross-examination; (2) in this case the evidence was in fact disregarded by the learned District Judge and did not influence him in arriving at his decision; (3) the Court may call further evidence even after the close of the defence if the evidence appears to be essential to the just determination of the case, but should the further evidence prove adverse to the accused then opportunity must be afforded the defence to cross-examine and to call evidence in rebuttal.

Cases referred to:—

(1) *Public Prosecutor v. Chong Ngan and Chan Hong* N. S. Criminal Trial No. 35 of 1947 — unreported.
(2) *Teo Koon Seng v. Rex* (1936) M.L.J. 10.
(3) *V. K. S. Samy v. Rex* (1937) M.L.J. 173.
(4) *R. v. Dora Harris* (1927) 2 K.B. 595.
(5) *R. v. McMahon* 24 Cr. App. R. 97.
(6) *Selvadurai v. Chinniah* (1938) F.M.S.L.R. 293; (1939) M.L.J. 253.
(7) *Mofizuddin Mondal & Anor. v. Sekandar Molla* A.I.R. (1934) Cal 133.
(8) *R. v. Howarth* 13 Cr. App. R. 99.

MAGISTRATE'S CRIMINAL APPEAL.

K. K. Benjamin for the appellant.

J. C. Kilner (D. P. P.) for the respondent.

Callow J. : —This is an appeal from the Court of the District Judge, Seremban, sitting at Kuala Pilah against the conviction and sentence of 12 months r.i. imposed on the 19th February, 1948, for criminal intimidation.

The petition of appeal contained 19 so-called grounds. Mr. Benjamin for the appellant very properly disassociated himself with twelve, saying quite correctly that they consisted largely of mere argument. It should be observed that Mr. Benjamin explained that owing to short notice and the intervention of the Easter holiday he had had no opportunity to revise and amend the grounds which had already been filed.

The two points argued, apart from sentence, were :—

(a) That the evidence of prosecution witnesses 2 and 3 was inadmissible, and acceptance necessarily affected the verdict; and
(b) The defendant should have been afforded an opportunity to rebut the evidence of the witness called by the Court.

On point (a) the learned Deputy Public Prosecutor submitted that section 15 of the Evidence Enactment sanctioned such evidence. I am doubtful whether the section can be held to include evidence of other acts of criminal intimidation against other persons on another day, so as to negative a possible misunderstanding by the principal witness Sanmugam (4 P.W.) when he came to give evidence later. I do not think the learned District Judge so held, and in consequence paragraph 3 of the grounds of judgment may be interpreted to mean that the evidence of prosecution witnesses 2 and 3 was disregarded.

Evidence submitted in accordance with the provisions of section 15 of the Evidence Enactment should be confined to the rebuttal of a defence of

accident, mistake or other innocent condition of mind (9th Ed. *Woodroffe & Ameer Ali on Evidence* page 220). The defence may even be anticipated, and the evidence of system, as it is often described, is given to show an accused person has been concerned in conduct of the same kind and proximate in time to the conduct in question.

This Court held recently in *Public Prosecutor v. Chong Ngan & Chan Hong*[1] following *Teo Koon Seng v. Rex*[2] and *V. K. S. Samy v. Rex*[3] that in a charge of extortion evidence of attempts to extort from other persons on other days is inadmissible. So do I consider in cases such as this, which despite the learned Deputy Public Prosecutor's submission, was connected with a trade dispute, that evidence of the conduct of the accused with reference to other employees of the Senena Estate the day previous can seldom be admissible. There was no other evidence led, so far as I apprehend the proceedings, to show system or intention. The appellant had been dismissed, but no reason is given on the record as to why his employment was terminated. The only mention I observe is in the cross-examination of P.W. 5 N. Selladurai when it is suggested that the estate employees would strike if reasons were not given for the appellant's dismissal.

In any event evidence of system should not be tendered before the testimony of the principal witness, in this case Sanmugam (P.W. 4), and the nature of the defence would then have been apparent by cross-examination. In point of fact the defence is an *alibi*, and I cannot conceive why learned Counsel for the accused in the Court below did not disclose it at the earliest possible moment.

The case for the prosecution was that the appellant had threatened Sanmugam (prosecution witness 4) if he did not stop work. The defence is that the appellant did not, and could not, have threatened Sanmugam (4 P.W.) because at the material time neither the appellant nor Sanmugam were where the prosecution allege the offence occurred.

In my view the admission of the evidence of prosecution witnesses 2 and 3 is arguable, but it should not have been submitted until after the evidence of the complainant Sanmugam (4 P.W.). The learned District Judge inclined to its inadmissibility, and had this been trial by jury the point would have been most material. But the learned District Judge directed himself to disregard the evidence, which was not challenged by Counsel for the accused on presentation, and I do not find that this evidence can be held to have influenced the learned District Judge in arriving at the finding recorded.

This ground of appeal fails.

Point (b) has caused me considerable thought. The admission of evidence after the close of the defence is so often liable to lead to controversy. As observed in *R. v. Dora Harris*[4] it is usually expedient to abide by the general rule and disallow fresh evidence to be gone into after the close of the case. The prosecution having concluded, and having left the Court with sufficient evidence whereby a conviction should be recorded, for if otherwise there is no case to answer, the defence is called upon. If at the conclusion of the case for the defence a reasonable doubt has been raised, then the accused is entitled to discharge.

Now what happened here? The defence subpoenaed Kanniappan but did not call him. Thereupon the prosecuting officer appears to have asked the reason why. Clearly he had no right to interject, and then came the remarkable statement of learned Counsel for the accused Mr. Pillai, that Kanniappan was not called because "he had not an opportunity to question him to-day since he was in the presence of certain labourer". What that meant I cannot surmise, but with other matter it gave rise to well deserved censure by the learned District Judge in paragraph 12 of the grounds of judgment. Kanniappan was a most material witness, for the defence was that at the relevant time he, not Sanmugam, was the telephone operator, and therefore the latter could not have suffered criminal intimidation as alleged.

Now the English law is as follows:—

> A Judge at a criminal trial has the right to call a witness not called by either the prosecution or the defence, without the consent of either the prosecution or the defence, if in his opinion that course is necessary in the interests of justice, but in order that injustice should not be done to an accused person, a Judge should not call a witness in a criminal trial after the case for the defence is closed, except "in a case where a matter arises *ex improviso*, which no human ingenuity can foresee, on the part of the prisoner, otherwise injustice could ensue." (R. v. McMahon[5]).

Can this be said to be a matter which had arisen *ex improviso* on the part of the accused? The very circumstances are such as would never arise in a defended case in England. Kanniappan was available at the trial, having been subpoenaed by the defence, and presumably the Court was at liberty to infer that his testimony had it been offered would have been adverse to the party, that is to say the defence, who had subpoenaed him but had refrained from calling him. I have directed my attention to the case of *Selvadurai v. Chinniah*[6] and distinguish it by observing that the defence of *alibi* having been raised the *onus* of proof thereof is on the accused.

But what did the learned District Judge mean in paragraph 10 of the grounds of judgment when he wrote :—

"The Court was satisfied that Sanmugam had spoken the truth *and any doubt which had been introduced by the defence was dispelled by the evidence of Kanniappan*"?

Does it mean that the defence *did* introduce a doubt which existed in the mind of the District Judge when the defence closed? If so, and if that doubt was reasonable then the accused was entitled to acquittal. A Court should not call a witness who had been available to a party, in order to dispell any doubt the defence had been able to raise; nor, as it would appear possible to infer in this case, at the suggestion of the prosecution (14th Ed. *Sohoni's Code of Criminal Procedure* page 1071).

In this country the power of the Court to examine any person is in accordance with the provisions contained in section 425 of the Criminal Procedure Code. This section reads :—

"Any Court may at any stage of any inquiry, trial or other proceeding under this Code summon any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined, and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case."

I can find no local case to guide me, so I turn to the principles I find set out in the text books and reports of England and India, and at page 1070 of the 14th Edition of *Sohoni's Code of Criminal Procedure* is the similar section to 425 (*supra*). The first note is a commentary on how the powers of the Court should be exercised, and it seems to me that such powers and their exercise are wider than the corresponding power in English law. In my view the powers here are not necessarily confined to matters arising *ex improviso,* but are to be exercised so as to enable the Court to arrive at a just and proper decision. The powers are very wide, but for this very reason great care is required in the exercise of the discretion; it is given to prevent any miscarriage of justice in a case, such as this, where a particular witness has not been called (14th Ed. *Sohoni's Code of Criminal Procedure* page 1070). It is entirely a matter for the discretion of the Court, and although I am not inclined to favour the procedure, and particularly in view of the possibility of the doubt in favour of the accused which appears to have remained in the mind of the learned District Judge up till the hearing of the witness Kanniappan, it is not for this Court to pronounce it to be wrong.

Now having called Kanniappan the Court rightly afforded the prosecution and the defence the opportunity to cross-examine the witness. I wonder why the case was not there and then concluded instead of being adjourned for ten days.

On resumption Counsel for the accused applied to call evidence in rebuttal of the testimony of Kanniappan, but this the Court below refused to allow. Was the learned District Judge correct?

Mr. Benjamin's argument before me was not directed so much as to the calling of the witness Kanniappan, but to the refusal of the Court below to allow the defence to rebut it. That of course is a danger of hearing evidence after the close of the defence; the side which is affected unfavourably by the additional evidence may seek to answer it, and so the proceedings, which should have terminated earlier, may go on and on.

The point to be decided is whether the Court below, having exercised the discretion in calling a witness, his evidence presumably appearing essential to the just determination of the case, should have refused the defence application to call further evidence in rebuttal.

The evidence proved to be in favour of the prosecution. Was it just to refuse the defence the opportunity to rebut it?

Again I can find no local case or Indian report on the precise point I have little doubt that it has received the attention of the Courts in India, but Counsel could not assist me, and my research has not proved very successful.

According to the 29th edition of *Archbold's Criminal Pleading, Evidence and Practice* page 496 "... matter so arising may be answered by contrary evidence on the part of the Crown". May not the defence be equally so privileged?

Mofizuddin Mondal & anor. v. Sekandar Molla[7] cited by learned Counsel for the appellant supports this, and states quite clearly that when evidence is admitted at the request of the prosecution after conclusion of argument, then an accused person must be given opportunity of adducing evidence in rebuttal. I think this case proximates to the one under consideration, for it would appear from the record that the calling of Kanniappan was first mooted by the prosecuting officer.

In *R. v. Howarth*[8] the head-note reads :—

"When after the summing up a witness is recalled and interrogated, a defendant has the right to cross-examine him and to give evidence in rebuttal".

In this case it does not seem that on the day the evidence of Kanniappan was taken there was any

suggestion to or on behalf of the accused that evidence in rebuttal should be tendered; the application was not made until the Court resumed ten days later. And does *R. v. Howarth*[8] confine such further evidence to the accused, or may the defence call *other* witnesses?

The whole matter is very much one within the discretion of the Court below, but the discretion must be exercised most guardedly, and never, I think, if it can be interpreted as unfavourable to the accused.

After consideration of the authorities I have cited, others I have studied, and from the general circumstances of the case, I distinguish the law in this country from that in England by holding that whereas in England the Court *should not* call a witness after the close of the defence unless something has arisen *ex improviso,* which no human ingenuity could foresee, *on the part of the accused;* in Malaya the power so vested in the Court by virtue of section 425 of the Criminal Procedure Code may be exercised after the close of the defence if the further evidence appears essential to the just determination of the case.

But should this further evidence prove adverse to the accused (it is arguable if the same principle is applicable should the further evidence prove adverse to the prosecution) then opportunity must be afforded the defence to cross-examine, and to call evidence in rebuttal.

Therefore as this was not done in the Court below the appeal on this point succeeds.

Learned Counsel for the appellant submitted that during the trial in the Court below a certain atmosphere arose hostile and prejudicial to the accused. I am happy to observe that he in no way made improper suggestions against the learned District Judge, and expressly disassociated himself with the paragraphs of the petition of appeal which endeavoured to impute bias. It seems to me from the final paragraph of the grounds of judgment that the learned District Judge did not receive during the course of the trial the support which he is entitled to expect from the prosecuting officer and learned Counsel who there appeared for the accused. If this is so I trust it will not again be necessary for this Court to comment thereon.

The conviction and sentence imposed by the Court below are set aside, and in exercise of the powers contained in section 316(b) of the Criminal Procedure Code I order the accused to be committed for trial in this Court.

Conviction set aside.

WONG AH KEE v. PUBLIC PROSECUTOR

[A. Cr. J. (Evans J.) May 6, 1948]

[Ipoh — Criminal Appeal No. 22 of 1948]

Criminal Procedure Code (Cap. 6), s. 422 — Defect in charge — Excise Enactment (Cap. 133), s. 13(i) — Charge of possession of distilling apparatus — Still — Proof of nature of articles found — Omission of word "knowingly" in charge.

In this case the appellant was convicted of possession of distilling apparatus for distilling intoxicating liquor an offence under s. 13(i) of the Excise Enactment. On appeal it was argued (a) that the charge was bad as the word "knowingly" was left out in it; (b) that there was insufficient proof that the articles found were component parts of a still.

Held: (1) the defect in the charge did not embarrass the accused in making his defence and could be cured under s. 422 of the Criminal Procedure Code; (2) the *onus* was on the prosecution to prove clearly that the articles found in fact form a still for distilling intoxicating liquor and as they had failed to do so in this case the conviction must be quashed.

Case referred to:—

(1) *Lomas v. Peek* (1947) 2 All E.R. 574.

MAGISTRATE'S CRIMINAL APPEAL.

S. N. Veerasamy for the appellant.

Evans J. : — In this case the appellant was charged with having in his possession distilling apparatus for distilling intoxicating liquor and thereby committing an offence under section 13(i) of the Excise Enactment. Mr. Veerasamy for the appellant objected that the charge was, on the face of it, bad as the offence prescribed by the section is that of "knowingly" keeping or having in his possession any still. This is undoubtedly so, and the charge should have contained this word, but there are other considerations in determining the case.

In a very recent case, that of *Lomas v. Peek*[1] almost the same objection was taken, the words said to be omitted being "knowingly and wilfully permitting." That case largely turned on the wording of the Criminal Justice Act, 1925, and the words were held to be technical terms. That has no direct bearing on this case, but the principle behind it is much the same. The case is one which might fall within section 422 of the Criminal Procedure Code, and I should be prepared to exercise my powers under that section were it necessary. The principal consideration is whether the omission embarrassed the accused in making his defence. The proof of knowledge is, by the presumption in sub-section (ii) of section 13, thrown upon